COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-0743-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NICHOLAS S. RADTKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. Nicholas Radtke appeals his judgment of conviction for forgery-uttering contrary to § 943.38(2), STATS. After being read his ***Miranda***[1] rights, Radtke confessed to the crime in his juvenile supervisor's

[1] ***Miranda v. Arizonia***, 384 U.S. 436 (1976).

presence. On appeal, Radtke argues that the trial court erred by denying his motion to suppress his confession because the rules of his juvenile supervision compelled him to confess, thereby rendering the confession involuntary. We reject this argument and affirm.

Officer Eric Roller served as a juvenile court supervisor for sixteen-year-old Nicholas Radtke. As part of his supervision, Radtke was required to follow certain rules, and one of these rules required Radtke to "provide true and correct information verbally and to respond to [Roller]." Any violation of the rules subjected Radtke to potential sanctions,[2] and during regular meetings with Radtke, Roller advised him of these sanctions.

In 1997, while under juvenile court supervision, Radtke stole a check, forged a signature on the check, and then cashed the check at the Antigo Co-op Credit Union. Roller and sheriff's deputies Hendricks and Murray viewed a bank surveillance tape of the check-cashing. Because Roller was Radtke's juvenile court supervisor, he recognized Radtke on the tape. Roller, Hendricks, and Murray then went to Antigo High School to talk with Radtke. Four days before this meeting, Roller had become a police officer, but he was still employed as a part-time juvenile court supervisor. Thus, when he and the deputies went to the school, he was still serving as Radtke's juvenile court supervisor.

At the meeting, Murray told Radtke that Roller was now a "police officer," but Radtke was not specifically advised that Roller was not present in his capacity as his juvenile court supervisor. Murray read Radtke his ***Miranda*** rights,

[2] Possible sanctions included 10 days in jail, home detention, taking away his driver's license, and holding him 72 hours to investigate a rule violation.

and during Murray's questioning, Radtke verbally confessed to the forgery-uttering. During questioning, Roller, who was dressed in street clothes, sat across the table from Radtke. After Radtke confessed, Murray asked Roller to transcribe the confession. Roller then read the written confession to Radtke, who in turn read it and signed it.

Radtke moved to suppress the confession,[3] arguing that it was compelled in violation of his Fifth Amendment right because he was required to confess in Roller's presence or face sanctions under the rules of supervision. The trial court denied the motion and admitted the statement, noting that Roller's presence in the same room did not vitiate the voluntariness of the consent. After the trial court denied the motion, Radtke pled guilty and was convicted of forgery-uttering. This appeal followed.

Radtke argues that the trial court's denial of his suppression motion violated ***State v. Evans***, 77 Wis.2d 225, 235-36, 252 N.W.2d 664, 668-69 (1977), which provides that statements made to a parole or probation officer are inadmissible on subsequent related charges. Specifically, he argues that although Murray read him his ***Miranda*** rights, his statement was not voluntary, but compelled for the sole reason that his probation officer, who did not ask the questions, was present when he confessed. Radtke insists that the deputies should have told him that anything he said or did not say would not subject him to sanctions under the rules of supervision. We reject these arguments and conclude that Radtke waived his right to remain silent and that Roller's presence did not

[3] Radtke was waived into adult court.

compel Radtke to speak. Accordingly, we affirm the trial court's denial of Radtke's motion to suppress his confession.

Whether a defendant's statement was voluntary is a question of law we review de novo. *See* ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987). To determine if a confession is voluntary, we look at the totality of the circumstances surrounding the confession and balance the defendant's personal characteristics against the pressures police imposed to induce the defendant to respond to questioning. *See* ***id***. at 235-36, 401 N.W.2d at 765. Some police coercion or pressure is necessary to render a confession involuntary. *See* ***id***. at 237, 401 N.W.2d at 766. Further, a defendant's personal characteristics are determinative only when there is something against which to balance them, such as coercive tactics or threats. *See* ***id***. We will not disturb a trial court's factual findings, those surrounding the giving of the confession, unless clearly erroneous. ***State v. Woods***, 117 Wis.2d 701, 714-15, 345 N.W.2d 457, 464-65 (1984).

The Fifth Amendment provides, in pertinent part, that "[n]o person … shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend V. Under the Fifth Amendment, a defendant may refuse to answer questions if the answers might incriminate him in future criminal proceedings. ***Minnesota v. Murphy***, 465 U.S. 420, 426 (1984). However, a probationer must answer a probation officer's questions if accusations of criminal conduct prompt such questions, ***State v. Thompson***, 142 Wis.2d 821, 830, 419 N.W.2d 564, 567 (Ct. App. 1987), because a probationer's absolute obligation to keep his probation officer informed of his activities is the "very essence" of the probation system. ***Evans***, 77 Wis.2d at 231, 252 N.W.2d at 667. It is hoped that this free exchange will help the probation officer adequately supervise the probationer's activity and rehabilitate the probationer. ***Id***. Under ***Evans***, to simultaneously guarantee a

probationer's Fifth Amendment rights and also preserve the probation system's integrity, a probationer's compelled answers to a probation or parole agent's questions are inadmissible against the probationer in subsequent criminal proceedings on related charges. ***Id***. at 235-36, 252 N.W.2d at 668-69. In ***Thompson***, however, we clarified the meaning of ***Evans*** in light of the Supreme Court's ***Murphy*** decision. ***Thompson***, 142 Wis.2d at 830-33, 419 N.W.2d at 567-68. In ***Thompson***, we distinguished ***Evans*** from ***Murphy***: "***Murphy*** does not affect the application of ***Evans*** to his case because Minnesota authorities did not take the 'extra impermissible step' which was taken in this case: the state required [Thompson] to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent.'" ***Id.*** at 828-29, 419 N.W.2d at 566. Likewise, the State did not require Radtke to make that choice.

Reading ***Evans*** in light of ***Murphy***, we have explained that if a probationer must choose between giving answers that will incriminate him in a pending or subsequent prosecution and "losing his conditional liberty as a price for *exercising* his fifth amendment right to remain silent, the state may not use his answers for any evidentiary purpose in the criminal prosecution." ***Thompson***, 142 Wis.2d at 832, 419 N.W.2d at 568 (emphasis added). The probationer in ***Murphy*** volunteered relevant incriminating statements during an interview with his probation officer, and the Supreme Court held the statements admissible in the probationer's subsequent prosecution. ***Id.*** at 440.

Murphy explains that a probationer's general obligation to appear and answer questions truthfully does not transform a voluntary statement into a compelled one. *See* ***id.*** at 427. By contrast, a probationer's answers to questions are not compelled within the meaning of the Fifth Amendment unless the probationer is required to answer *after validly claiming the privilege*. ***Id***. The

Supreme Court has long acknowledged that the Fifth Amendment "speaks of compulsion." ***Id***. Like a witness subpoenaed to testify at a trial, if the probationer wants Fifth Amendment protection, he must claim it or the statement will not be "compelled."[4] ***Id.*** There are a number of exceptions to this general rule, ***id.*** at 429-30, one of which is if the assertion of the privilege results in penalty and "foreclos[es] a free choice to remain silent, and … compe[ls] … incriminating testimony." ***Id.*** at 434 (citation and internal quotes omitted). In such a case, the Fifth Amendment privilege is self-executing:

> [I]f the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 435 (*quoted in* ***Thompson***, 142 Wis.2d at 832, 419 N.W.2d at 568). In short, if the State does not threaten sanctions or penalties to compel a probationer's answers, a probationer's Fifth Amendment privilege is not self-executing, but must be invoked. ***Id***.; *see also* ***Thompson***, 142 Wis.2d at 832, 419 N.W.2d at 568. Here, there was no threat of sanctions, so Radtke's privilege was not self-executing.

[4] Radtke also cites ***State v. Carrizales***, 191 Wis.2d 85, 95, 528 N.W.2d 29, 32 (Ct. App. 1995), and ***State v. Childs***, 146 Wis.2d 116, 123-24, 430 N.W.2d 353, 356 (Ct. App. 1988), for the ***Evans*** standard. Neither case is very helpful to our analysis here. In ***Carrizales***, we held that the probationer's right against self-incrimination was not violated because his admission of guilt would not incriminate him in a subsequent criminal proceeding. ***Id.*** at 89, 528 N.W.2d at 29. Radtke's statements, however, were incriminating. In ***Childs***, the main issue we addressed was whether the admission of a probationer's statement to his parole officer was harmless error. ***Id.*** at 123-25, 430 N.W.2d at 356-57.

Like ***Murphy***, here there was no express or implied assertion that if Radtke invoked his Fifth Amendment privilege, he would be subjected to sanctions. *See* ***id***.; *see also* ***Thompson***, 142 Wis.2d at 832, 419 N.W.2d at 568 (discussing ***Murphy***). In contrast, Murray told Radtke that he could remain silent and that he did not have to speak to the officers at all. This assurance that he could remain silent is inconsistent with Radtke's claim that the rules of probation compelled him to answer Murray's questions. Significantly, there is no evidence that Radtke confessed because he feared sanctions if he remained silent. *See* ***Murphy***, 465 U.S. at 437-38. As the State points out, Radtke never testified at the suppression hearing, and therefore never indicated that he thought the rules of supervision precluded him from invoking his Fifth Amendment privilege.[5] In any event, the reading of ***Miranda*** rights would have eliminated any perceived threat. Under the totality of the circumstances, Radke could not have reasonably feared that assertion of his Fifth Amendment privilege would have led to revocation.

Finally, Radtke's arguments under ***Evans*** and ***Thompson*** are unpersuasive because those cases differ from this case. First, unlike in ***Evans*** and ***Thompson***, the officers did not threaten Radtke with sanctions for failing to answer, but told him he could remain silent.[6] Second, in ***Thompson***, the defendant was not given his ***Miranda*** warnings before the interview. *See* ***id.*** at 827, 419 N.W.2d at 566. By contrast, Radtke was read his rights and expressly waived his right to remain silent. Third, in ***Evans*** and ***Thompson***, probation officers

[5] In ***Murphy***, the probationer was not expressly informed during the meeting with his probation officer that asserting his Fifth Amendment privilege would result in the imposition of a penalty. ***Minnesota v. Murphy***, 465 U.S. 420, 426 (1984). Neither was Radtke. The ***Murphy*** Court concluded that no impermissible penalty attached. We conclude the same.

[6] Moreover, as ***Murphy*** notes, "the state cannot constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." ***Id.*** at 438-39.

questioned the probationer. *See* ***Evans***, 77 Wis.2d at 228-29, 252 N.W.2d at 665; ***Thompson***, 142 Wis.2d at 826-27, 419 N.W.2d at 565-66. Here, however, Roller did not ask the questions, Murray did. Significantly, there is no evidence to suggest Murray was questioning Radtke on his behalf. The fact that Roller transcribed the confession, wore plain clothes, and sat across from Radtke does not mean that Murray was questioning him on Roller's behalf. Moreover, Radtke was specifically told that Roller was present as a police officer.[7]

In summary, because Radtke was read his ***Miranda*** rights, but chose not to invoke his privilege and thereby waived his right to remain silent, there was no "threat" or coercion. Additionally, the supervisor's mere presence as a police officer was insufficient to "compel" Radtke's incriminating statements. Given that no threat was present, we cannot deem the confession involuntary. *See* ***Clappes***, 136 Wis.2d at 237, 401 N.W.2d at 766. The trial court properly denied Radtke's motion to suppress his confession.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] This discussion should not be read to absolutely require a probation officer's presence. For example, if a police officer questioned a probationer on the probation officer's behalf, the police officer would, in effect, have asked the questions, thus possibly warranting suppression. We again stress that there is no evidence that Murray questioned Radtke on Roller's behalf.